

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 6**

**MURRAY AMERICAN ENERGY, INC. AND THE  
MONONGALIA COUNTY COAL CO., A  
SINGLE EMPLOYER**

**and**

**Case 06-CA-254520**

**UNITED MINE WORKERS OF AMERICA,  
DISTRICT 31, LOCAL 1702, AFL-CIO, CLC**

**STATEMENT IN OPPOSITION TO  
MOTION TO CONDUCT HEARING BY VIDEOCONFERENCE**

COMES NOW the Charging Party United Mine Workers of America, District 31, Local 1702, AFL-CIO, CLC (the “UMWA”) and hereby states its opposition to the Motion of the National Labor Relations Board General Counsel to Conduct Hearing by Videoconference in the above-captioned case. The hearing in this matter is set for June 22, 2020 at the Pittsburgh, PA offices of the National Labor Relations Board (the “NLRB”). Complaint & Notice of Hearing at 5. On June 5, 2020, the General Counsel moved the administrative law judge to conduct the hearing via the Zoom online videoconferencing platform, citing the “compelling circumstances” created by the ongoing COVID-19 pandemic. Motion to Conduct Hearing by Videoconference at 1. However, it is inappropriate to conduct the hearing in this case via Zoom for the following reasons:

**1. Hearing participants may not have access to a reliable internet connection, which may cause delays and interfere with reliable examination.**

Successful use of Zoom requires access to a computer, tablet, or cellphone with audio and video capabilities, and either a strong internet connection or enough cellular data to complete the hearing. The UMWA anticipates that the NLRB General Counsel will call UMWA staff

members and/or UMW-represented employees to testify in this case. The UMW also reserves its right as the Charging Party to call such witnesses itself. The UMW anticipates further that the Charged Party single employer Murray American Energy, Inc. and Monongalia County Coal Co. (“Monongalia”) will call management employees as witnesses. At this time, it is unknown whether these witnesses will have difficulty connecting to and/or remaining connected through Zoom. This is of particular concern given that these witnesses are likely located in West Virginia – the residence of most individuals working at the coal mine operated by Monongalia – and the state is known to have inconsistent access to high-speed internet, as well as to strong cellular signals. *See, e.g.,* Julie Taboh, *Lack of Internet Access Hurting West Virginians*, Voice of America, June 21, 2019, <https://www.voanews.com/silicon-valley-technology/lack-internet-access-hurting-west-virginians> and Anthony Izaguirre, *Questions Over Coverage Plague Rural Broadband Expansion*, PBS, April 15, 2019, <https://www.pbs.org/newshour/nation/questions-over-coverage-plague-rural-broadband-expansion>. During the pendency of the COVID-19 pandemic, it would put these witnesses at risk to require them to leave home to seek out a stronger internet connection. The availability of public networks, if any, does not solve this problem because of the security risks inherent in unrestricted internet connections.

Even if witnesses were able to connect to Zoom initially, unreliable connections could lead to interrupted and delayed video feeds, interrupting the proceedings and making it impossible for witnesses to respond to questions in real time. Indeed, any witness using an unreliable internet or cellular connection risks being disconnected from Zoom entirely while testifying. Such circumstances would expose the parties to accusations of coaching witnesses while they are off-screen, or even to accusations that a witness had disconnected himself intentionally in order to stall the hearing and/or seek coaching. Such problems create the risk that

testimony of witnesses with slow internet or cellular connections will not be perceived on equal footing with that of witnesses with faster or more reliable connections.

A slow or unreliable connection also might interfere with the creation of an intelligible transcript of the hearing. Witness testimony, as recorded in the transcript, may include multiple “unintel.” notations. This would create a deficient or incomplete record, complicating any appeal or even requiring another hearing to correct the deficiencies. Additionally, witnesses’ attempts to immediately distribute electronic versions of exhibits during the hearing will further stress their potentially-limited connections, possibly stalling video or resulting in failure to transmit the exhibits. The administrative law judge (the “ALJ”) has not established a process for responding to participants’ loss of connection during the hearing, despite the strong possibility that witnesses will video may disconnect, nor has the ALJ provided participants with troubleshooting information or IT functions to assist participants with connectivity problems.

## **2. The use of Zoom will inhibit credibility determinations substantially.**

The outcome of this case will turn in part on the credibility of witnesses regarding – among other issues – the extent of Monongalia’s implementation of certain paperwork and fee-payment requirements for UMWA-represented employees and their representatives seeking access to the employees’ personnel files. The UMWA anticipates that the testimony of UMWA witnesses and that of Monongalia’s witnesses will contradict each other, and the ALJ will be required to assess witness credibility to determine whether the General Counsel and/or the UMWA has proven that these requirements represent Monongalia’s longstanding policy regarding personnel file requests. The ALJ’s credibility determinations are a crucial and challenging task, even during in-person hearings, and the NLRB does not set such determinations aside easily. *See, e.g., Stevens Creek Chrysler Jeep Dodge, Inc.*, 357 NLRB 633, 635 (2011), *enf’d sub nom. Mathew Enter., Inc. v. NLRB*, 498 Fed. Appx. 45 (D.C. Cir. 2012) (stating, the “Board is reluctant

to overturn the credibility findings of an Administrative Law Judge” and “only in rare cases will it do so,” particularly when such findings are based on witness demeanor) (internal quotations and citations omitted).

The ALJ’s task of assessing witness credibility is complicated further when a witness testifies via Zoom inasmuch as it might be difficult for the ALJ to observe witness facial expressions and body language that the ALJ would observe easily in person. Depending on the size of the screen the ALJ uses to view hearing participants, the video image of the witness may be only a few square inches in size. The lighting and camera positioning for each witness also will create video feeds of varying quality. Some witnesses might focus the camera only on their head and shoulders, making it impossible for the ALJ to observe nuanced movements that suggest tension or deception, or to collect other demeanor evidence. Additionally, poor audio and/or video quality, which are often the result of connectivity issues outside the ALJ’s or witnesses’ control, might delay witnesses’ responses. Such interruptions can impact credibility assessments negatively, despite the content or delivery of their testimony. A witness’s perceived credibility should not be contingent on the strength of his internet or cellular connection.

**3. The social distancing requirements of the COVID-19 pandemic prevent the ALJ from following the NLRB’s own guidance regarding the proper conduct of videoconference hearings.**

NLRB Operations Memo 08-20 established the procedures governing the NLRB’s implementation of videoconference hearings in representation cases under the National Labor Relations Act. *Operations Memo 08-20 re: Pilot Video Testimony Program in Representation Cases* (Jan. 8, 2008) (hereinafter “*Ops. Memo*”). The concerns attendant to video testimony in representation cases and in unfair labor practice (“ULP”) cases like this one are sufficiently similar that the NLRB has adopted the standard governing video testimony in ULP matters for

use in representation cases. *See Morrison Healthcare*, 369 NLRB No. 76 at \*1-2 (2020). The operations memo's guidance, therefore, should apply to videoconference hearings in ULP matters.

This guidance calls for witnesses to testify using video equipment located in NLRB offices, the offices of another federal agency, or in commercial business centers. *Ops. Memo* at 2, 2 n.2. Such measures are currently impossible due to the shutdown of federal offices and the large-scale closure of most types of businesses on account of the COVID-19 pandemic. While the NLRB envisions allowing witnesses to testify using their personal videoconferencing equipment when "videoconferencing from a neutral location is not feasible," such a solution is not workable here for the reasons stated in Section 1, *supra*. There exists no way, therefore, for the ALJ to follow the NLRB's video testimony guidelines in the context of this case.

**4. The parties are not prejudiced by an in-person hearing to be held in the near future.**

Any delay in scheduling the hearing will not prejudice any party. There is no risk of memories fading or documents becoming unavailable in so short a timeframe. As explained above, however, the proceedings undoubtedly will be compromised if the hearing were to take place via Zoom. Accordingly, the UMWA respectfully requests that the ALJ postpone the hearing scheduled for June 22, 2020 until an in-person hearing is feasible.

**5. In the alternative, the ALJ should impose robust safeguards on any Zoom hearing so as to preserve parties' due process rights.**

If the ALJ denies this Motion and proceeds to hold the hearing via Zoom, the safeguards outlined in *EF International Language Schools, Inc.* (363 NLRB No. 20 (2015), *enf'd* sub nom. *EF Int'l Language Sch., Inc. v. NLRB*, 673 Fed. Appx. 1 (D.C. Cir. 2017)) are necessary to protect the parties' rights to due process. In particular, representatives for all parties should be allowed to be present at each location from which witnesses testify, the ALJ should ensure that

all witnesses have access to video cameras capable of providing both close-up views of the witnesses and panoramic views of the rooms in which they testify, and video technicians should be available in each testimony location to resolve any technological problems. *Id.*; see also *Ops. Memo* at 3 (calling for ALJs to ensure that a witness testifying via videoconference use cameras that are able to scan the room in which he testifies to ensure he does not read inappropriately from documents, and calling for the ALJs to maintain remote control over all such cameras in order to view the rooms and their occupants in their entirety). Such measures are necessary to preserve the integrity of the proceedings and to enable the ALJ to verify that witnesses testify successfully and without coaching, reading documents (except for exhibits that counsel might direct witnesses to consult), or any other improprieties.

Respectfully Submitted,

/s/ Laura P. Karr

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## **CERTIFICATE OF SERVICE**

I hereby certify that on June 8, 2020, I served a copy of the foregoing Response in Opposition to Motion to Change Hearing Date via electronic transmission on the following:

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/s/ Laura P. Karr

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